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In the Supreme Court of the United States

OCTOBER TERM, 1990

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL., PETITIONERS

v.

AMERICAN TRAIN DISPATCHERS' ASSOCIATION, ET AL.

CSX TRANSPORTATION, INC., PETITIONER

v.

BROTHERHOOD OF RAILWAY CARMEN, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONSE FOR THE FEDERAL RESPONDENTS TO THE SUPPLEMENTAL MEMORANDUM OF THE UNION RESPONDENTS IN SUPPORT OF THE MOTION TO DISMISS THE PETITIONS

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TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1027

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL., PETITIONERS

v.

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In a supplemental memorandum filed September 19, 1990, respondents American Train Dispatchers' Association and Brotherhood of Railway Carmen (the union respondents) renew their contention that the writs of certiorari should be dismissed because the

question presented has become moot or has ceased to be an important federal issue. The union respondents' argument is based on the decision of the Interstate Commerce Commission, issued June 21, 1990, on remand from the court of appeals. *CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, 6 I.C.C.2d 715.[1]

The union respondents assert that the question before this Court has become "virtually irrelevant" because the Commission's decision on remand "shifted the focus of the dispute in these cases from the scope of the Commission's authority under [49 U.S.C.] 11341(a) to the scope of its authority under [49 U.S.C.] 11347, an issue not reached below and not presented by petitioners to this Court." Supp. Mem. 4. In particular, the union respondents point to the Commission's statement that "whatever the extent of [the Commission's] authority under * * * [§ 11341(a)], it is also defined and limited by the labor protective conditions adopted by the Commission pursuant to § 11347." 6 I.C.C.2d at 720. See also *id.* at 751 n.29 ("[W]hatever the extent of the exemptive authority conferred by * * * [§ 11341(a)] with respect to CBAs [collective bargaining agreements] in the context of mergers and consolidations, it does not go beyond the limits of our authority under § 11347 and the labor protective conditions.").

[1] The union respondents based their motion to dismiss, filed May 24, 1990, on a press release announcing the Commission's general conclusions. In response, the federal respondents suggested that consideration of the motion be deferred until the Commission published its decision. On June 11, the Court issued an order suspending further consideration of the motion to dismiss, and further briefing, for 120 days. 110 S. Ct. 2615 (1990). The federal respondents lodged copies of the Commission's decision with the Court on June 29.

The union respondents misinterpret the significance of the Commission's decision. As the Commission explained, the focus on Section 11347 was necessary to comply on remand with the mandate of the court of appeals. See *CSX Corp.*, 6 I.C.C.2d at 756 n.34 ("[W]e rely on § 11341 as furnishing authority to replace [Railway Labor Act] procedures, but in accordance with the opinion of the Court of Appeals, we do not rely on § 11341 as a basis for effecting modifications of CBAs."). The Commission expressly noted in its decision on remand that it is "advancing [in this Court] the argument that the Court of Appeals was in error on this point and that § 11341 does furnish a further basis for modification of CBAs to the extent permissible under § 11347 and the labor protective conditions." *Ibid.*[2]

One month later, on July 20, the Commission further explained its position, and removed any possible doubt as to mootness, in a decision denying petitioners' application for a stay of the June 21 decision.[3] In its July 20 decision, the Commission said:

[2] The Commission also noted that "[i]n cases which do not come within the [Washington Job Protection Agreement] or our WJPA-based labor conditions, * * * it may be necessary for us to assert the full measure of our authority under § 11341(a) to avoid frustrating the will of Congress." 6 I.C.C.2d at 756.

In a separate opinion concurring in part and dissenting in part, Commissioner Lamboley reasoned that the authority to displace Railway Labor Act procedures implies authority to conclude an "implementing agreement" that modifies existing CBAs. Commissioner Lamboley concluded that the authority to effect such modifications is to be found, if anywhere, only in Section 11341. See 6 I.C.C.2d at 759, 774.

[3] A copy of the July 20 decision is attached as an appendix to this response.

> [P]etitioners appear to be complaining that we have impermissibly limited the reach of Section 11341(a). As we have stated, to the extent we asserted Section 11341(a) authority at all we concluded that such authority must extend "at least to the extent" of our Section 11347 authority in the June 21 Decision. We also indicated in that decision that we are asserting more expansive Section 11341(a) authority before the Supreme Court. 6 I.C.C.2d at 756 n.34. If that Court should rule that the *Carmen* court was in error, we would, of course, consider the appropriate scope of our authority under Section 11341(a). * * *

App., *infra*, 13a. Moreover, the Commission said it did not disagree with the statement that

> [i]f the Supreme Court rules, as both CSXT and the Commission have urged, that § 11341(a) broadly immunizes CSXT from compliance with "all legal obstacles," the Commission will need to reconsider its decision that such broad immunity was intended by Congress to be restricted nonetheless by a requirement that it be balanced with the obligations flowing from collective bargaining agreements.

App., *infra*, 13a n.9.

In short, the decisions of the Commission demonstrate that there is a "presently existing dispute * * * between the parties to this case" as to the interpretation of Section 11341. *Burke* v. *Barnes*, 479 U.S. 361, 364 (1987). Accordingly, the question before the Court is not moot.

For the foregoing reasons, it is respectfully submitted that the motion to dismiss the petitions should be denied.

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Interstate Commerce Commission

SEPTEMBER 1990

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* The Solicitor General is disqualified in this case.

APPENDIX

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 28905 (Sub-No. 22)

CSX CORPORATION—CONTROL—CHESSIE SYSTEM, INC. AND SEABOARD COAST LINE INDUSTRIES, INC.

Finance Docket No. 29430 (Sub-No. 20)

NORFOLK SOUTHERN CORPORATION—CONTROL—NORFOLK AND WESTERN RAILWAY COMPANY AND SOUTHERN RAILWAY COMPANY

DECISION

Decided: July 19, 1990

[Service Date: July 20, 1990]

On July 2, 1990, Norfolk & Western Railway Company and Southern Railway Company (jointly "N&W") filed a petition to stay the effectiveness of the Commission decision served June 21, 1990 in these proceedings and reported at 6 I.C.C.2d 715 (the "June 21 Decision"). In that decision we reversed and vacated two arbitration awards and remanded the proceedings to the parties to continue the negotiation and arbitration procedures established under our labor protective conditions. 6 I.C.C.2d at 722, 757, 775.

N&W seeks a stay "pending completion of judicial and administrative proceedings following the Supreme Court's disposition of *Norfolk & Western v.*

American Train Dispatchers Association, No. 89-1027, consolidated with *CSX Transportation, Inc. v. Brotherhood of Railway Carmen*, No. 89-1028."[1] Alternatively, N&W seeks a stay pending disposition of a petition to reopen and for reconsideration of the June 21 Decision. N&W filed that petition on July 11, 1990. On the same date, N&W filed a petition for stay pending judicial review indicating that it intends to file a petition for review of the June 21 Decision "in a court of appeals." Pet. at 4.

On July 2, 1990, CSX Transportation, Inc. ("CSX") also filed a petition to stay the June 21 Decision. CSX seeks to stay the effectiveness of that decision until the Commission disposes of a petition for reconsideration and clarification. That petition was filed by CSX on July 11, 1990. In addition, CSX filed a petition for stay pending judicial review on July 11, 1990, indicating that it intends to seek review in the United States Court of Appeals for the District of Columbia Circuit.[2] The Brotherhood of

[1] On March 26, 1990, the Supreme Court granted petitions for writs of certiorari in Nos. 89-1027 and 89-1028 to review the decision of the Court of Appeals for the District of Columbia Circuit in *Brotherhood of Railway Carmen v. ICC*, 880 F.2d 562 (D.C. Cir. 1989) (the *"Carmen"* decision). In *Carmen*, the court of appeals reversed our earlier decisions in these proceedings reported at 4 I.C.C.2d 641 and 1080. See discussion in the June 21 Decision, 6 I.C.C.2d at 729-30, 756 n. 34.

[2] We will consider the arguments in the two petitions for stay pending judicial review, although we question whether judicial review is a available at this time since we are only ruling on the petitions for stay. *United Transportation Union v. ICC*, 871 F.2d 1114 (D.C. Cir. 1989) (judicial review of agency decision not available to party that has also filed a petition for reconsideration that remains pending before the agency); *ICG Concerned Workers Association v. United States*, 888 F.2d 1455 (D.C.Cir. 1989) (same).

Railway Carmen and the American Train Dispatchers' Association (jointly "Rail Labor") filed responses to the petitions for stay on July 9 and 16, 1990.

Petitioners have not demonstrated entitlement to a stay by reference to each of the four factors identified in the seminal decision of *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958):

(1) that there is a strong likelihood that the movant will prevail on the merits;[3]

(2) that the movant will suffer irreparable harm in the absence of a stay;

(3) that other interested parties will not be substantially harmed; and

(4) that the public interest supports the granting of the stay.

Analysis of the critical second factor essentially disposes of the stay petitions. Therefore, we first address whether petitioners have demonstrated that in the absence of a stay they will suffer irreparable harm.

I. IRREPARABLE HARM

Although the concept of irreparable harm does not lend itself to exact definition, there are several indisputable principles that guide us in our determination whether this requirement has been met. First, the anticipated injury complained of must not be specu-

[3] In *Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977), the court of appeals held that in a case in which the other three factors strongly favor interim relief, a stay may be granted if the movant has made a substantial case on the merits.

lative. As stated in *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C.Cir. 1985) (citations omitted; emphasis in originals in decisions quoted):

> [T]he injury must be both certain and great; it must be actual and not theoretical. Injunctive relief "will not be granted against something merely feared as liable to occur at some indefinite time"; the party seeking injunctive relief must show that "[t]he injury complained of [is] of such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm.

The court of appeals went on to describe the nature of the showing required of a party seeking the extraordinary remedy of a stay pending review (*id.* at 674):

> [T]he [petitioner must] substantiate the claim that irreparable injury is "likely" to occur. Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur. The [petitioner] must provide proof indicating the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future. Further, the [petitioner] must show that the alleged harm will directly result from the action which the [petitioner] seeks to enjoin.

It is also well settled that economic loss of itself does not constitute irreparable harm. In *Sampson v. Murray*, 415 U.S. 61, 90 (1974), the Supreme Court quoted "the traditional standards of *Virginia Petroleum Jobbers*" on irreparable injury:

> The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expanded in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

A corollary of this principle is that "mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Board v. Bannercraft Co.*, 415 U.S. 1, 24 (1974), citing *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51-52 (1938). Similarly, "[t]he usual time and effort required to pursue an administrative remedy does not constitute irreparable injury." *Randolph-Shephard Vendors of America v. Weinberger*, 795 F.2d 90, 108 (D.C. Cir. 1986).

Despite these well settled principles, petitioners premise their stay petitions on unsubstantiated and speculative allegations of injury and the expense and inconvenience of pursuing the remedies we have adopted, continued negotiation and, if necessary, arbitration. As the judicial precedents cited above clearly establish, neither of these contentions establish irreparable injury.

In its July 2 stay petition, CSX contends that, absent a stay, Rail Labor "*may* argue that the consolidation has to be undone;" or "*could* assert" that there was no ICC authority for the consolidation, or "*may* threaten a strike" (p. 2, emphasis added). Similarly, N&W aserts in its July 2 petition that "It *may . . . be suggested* that . . . the carriers now have an obligation to restore the *status quo ante*" (p. 9, emphasis added). Rail Labor responded (July 9 Response 8):

> [T]he claims of irreparable injury are based upon a possible strike, or return of the former separate operations to the *status quo ante* the transfers of work, etc. These claims of irreparable injury are wholly speculative and can be nothing more than that until [CSX and N&W] enter into negotiations . . .

We agree that petitioners have failed to demonstrate their feared injury is so real or imminent as to warrant the imposition of a stay delaying resolution of these proceedings.[4]

The likelihood that the transactions would ever have to be undone is diminished by the fact that, as petitioners correctly note, we did not find that the transactions were contrary to the standards that we enunciated in the June 21 Decision. As we stated (6

[4] We certainly could not endorse N&W's suggestion that we wait until the Supreme Court reviews *Carmen* in Nos. 89-1027 and 89-1028 *and* all subsequent administrative and judicial proceedings are completed. We considered the Supreme Court's grant of the writs of certiorari when we issued the June 21 Decision and noted our own participation in the Supreme Court proceedings, 6 I.C.C.2d at 756 n.34. We obviously made a determination at that time that the public interest was better served by issuing the June 21 decision despite the pending Supreme Court review. N&W mentions no subsequent events that should influence us to reverse that determination. In fact, there are indications that resolution by the Supreme Court has become more indefinite. That Court has suspended briefing until October 1990 (Rail Labor Response at 5-6). Even if certain procedural objections to those proceedings are overcome and the Court hears argument on the merits of *Carmen*, the Court may not resolve the dispute. The last time the Supreme Court considered an ICC consolidation case involving labor issues, the Court did not reach the merits, but vacated the court of appeals' decision on procedural grounds. *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1987).

I.C.C.2d at 722), we were unable to affirm the arbitrators' implementation of those transactions because the arbitrators "based their decisions on pronouncements that the *Carmen* court found to be incorrect statements of the law and that we modify in this decision . . .". The parties, and any arbitrators selected by the parties, are to be guided by the principles in the June 21 Decision. If, as petitioners contend, the transactions conform to those principles, there should be no need for any undoing of those transactions.[5]

The speculative nature of a potential strike is shown by the fact that there has been no threat, the remand was to the parties to "continue the implementing process *pursuant to Section 4 of the [Commission's] New York Dock conditions*" (6 I.C.C.2d at 722, emphasis added), and Rail Labor has cooperated in abiding by the procedures established under the Commission's labor protective conditions throughout these extended proceedings.[6]

CSX finds irreparable harm in being "forced to engage in additional negotiations and arbitration . . . requir[ing] further expenditures of time and the limited resources of the parties. . ." July 2 Petition

[5] N&W assumes (July 21 Petition 9) that a remand directly to an arbitrator would remove uncertainty as to any undoing. Since, as we will discuss below, the arbitrator in the N&W proceeding has opined that an arbitrator loses jurisdiction to rule on the merits once he renders his award, we believe that assumption is illusory.

[6] Rail Labor states in its July 19 Response (p. 3, emphasis in original) :

> *If* at a future date events indicate that the carriers' speculation are about to be proved correct, they will have adequate remedies in the courts at that time, particularly in the court before which they will be appearing on review of the Commission's June 21, 1990 decision.

10-11. N&W also finds ireparable injury in being required to negotiate with Rail Labor or "rearbitrate." July 2 Petition 5. But these are precisely the type of litigation or administrative expenses that the Supreme Court and the D.C. Circuit found did not constitute irreparable harm in the cases cited above. These expenses arise in connection with any decision that may be appealed or further litigated through appeal or remand. Accordingly, petitioners have not demonstrated that they will suffer irreparable injury in the absence of a stay.

II. LIKELIHOOD OF SUCCESSON THE MERITS

Petitioners have not made a strong showing that they are likely to prevail on the merits. While we are not here disposing of the two July 11 petitions seeking reopening, reconsideration, or clarification of the June 21 Decision, we will consider the allegations of error in those petitions to determine whether a substantial case on the merits has been made by petitioners.

CSX (Pet. for Recon. 7-8) and N&W (Pet. for Recon. 4-9) contend that the Commission committed material error when it failed to explain why the arbitration awards that were vacated did not meet the standards established in the June 21 Decision. As we have indicated above and at 6 I.C.C.2d at 722, we vacated the awards, not because we found them wanting under our newly-announced standards, but because the arbitrators in both decisions rested their awards on statements that the *Carmen* court found to be incorrect (see 6 I.C.C.2d at 729-30) and upon which we accordingly did not rely in our decision on remand (see 6 I.C.C.2d at 750-54). We fully articulated the reasons why we could not uphold the arbitrators' rulings.

We could have applied the new standards ourselves to the implementing agreements. We chose not to do so, however, because we believed this would diminish the freedom of the parties to negotiate as well as the role of arbitrators, upon whose expert guidance we intend to place great reliance. See discussion, 6 I.C.C.2d at 721-22, 753 n.31. We stated there that we were relying on the experience of arbitrators, management and labor to properly implement the new policy, balancing the rights and accommodating the needs of labor and management. 6 I.C.C.2d at 721. We did not abuse our discretion by remanding these two transactions for further consideration by the parties most directly involved.[7]

N&W has a related procedural complaint (Pet for Recon. 18-20) about our remand "to the parties" (with arbitration, if necessary, 6 I.C.C.2d at 757) rather than directly to an arbitrator. According to N&W, "potential uncertainty" would be removed by remanding to the arbitrator responsible for the N&W implementing agreement, Referee Harris (Pet. at 19). In light of Referee Harris' recent statements in Finance Docket No. 30965, *Delaware and Hudson Railway Co.,—Lease and Trackage Rights Exemption*

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[7] N&W argued as a further reason why the arbitrator's award in its case (the Harris award) should not be vacated that "the Harris award did not modify any contractual rights actually possessed by [the union]." Pet. for Recon. 6-8. Nevertheless, it appears clear that Referee Harris thought that contractual rights were being modified (see 6 I.C.C.2d at 727-28) and that the Commission believed an agreement was being modified (6 I.C.C.2d at 728-29), and that the *Carmen* court assumed the same (880 F.2d at 565). An argument that there was, in fact, no contract modification involved would appear to be most appropriately presented at the arbitration level, if the parties are unable to arrive at an agreement without resort to arbitration.

—*Springfield Terminal Co.*, it appears to us that direct remand to the arbitrator could well create greater uncertainties. In an arbitration award filed March 13, 1990, in that proceeding, Referee Harris had the following comments on a remand to an arbitrators (p. 41):

> Arbitrators, unlike judges, do not have continuing jurisdiction after rendering an award. "At common law, an arbitrator did not have authority to modify or correct an award once it had been rendered, because of the doctrine of *functus officia*; i.e. having rendered the award, the arbitrator's task has been fulfilled. Similarly, an arbitrator had no authority to commence a subsequent hearing." [Fairweather, *Practice and Procedure in Labor Arbitration*, 2nd Ed. (1983), at pp. 579-80.]
>
> While this general rule has been modified to allow for technical corrections such as correction of miscalculation of figures, mistakes in description, removal of portions of an award which exceeded the submissions, and correction as to form, corrections may not be made in the merits of the award.

We are not accepting the foregoing statement as necessarily an accurate statement of the law, or as one binding upon the Commission in its dealings with arbitrators. We could not ignore this declaration, however, when made by one of the two arbitrators involved in these proceedings (a former Chairman of the Federal Mediation Board, as noted by N&W, July 2 Pet. 8 n.8). It appeared to us when we decided this case that Referee Harris might decline a direct remand, leading to further delay. Pursuant to our

June 21 Decision, the parties are free to seek arbitration as soon as negotiations reach an impasse.

CSX (Pet. to Recon. 8) and N&W (Pet. to Recon. 18) complain that we have not supplied adequate guidance for the parties or arbitrators. We are disappointed that petitioners are unable to discern sufficient guidance in our extensive decision. We commend to their attention particularly the "Summary of Conclusions," 6 I.C.C.2d at 718-22, and "The Problem Today—Our Resolution," 6 I.C.C.2d at 745-54, where we set forth standards that we believe are more than adequate to guide arbitrators and the parties.[8]

N&W devotes a substantial portion of its Petition for Reconsideration (pp. 9-13) to the following alleged error (p. 10):

> The Commission apparently sees the Art. I, § 2 requirement that collective bargaining rights be preserved as a device that may, in some contexts, grant to a union representing a group of employees of one railroad in a merged system the right to impose its contract on another railroad in the system.

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[8] Rail Labor's comments on a related issue are relevant here (July 9 Response 4):

> Both carriers complain that the Commission was in error in not making specific findings as to the failure of each of the disputed awards to meet the criteria now posited by the Commission. Such complaints denote a carrier view of the Commission's decision in these cases as changing nothing; that the references throughout the Commission's opinion to the importance of preserving collective bargaining is so much meaningless verbiage . . .

N&W fails to furnish any citation to the June 21 Decision in which this proposition is stated. N&W does include two citations to that decision on the same page as the quotation, but N&W indicates that it agrees with the Commission in both instances. Since the Commission did not make the statement that N&W finds objectionable (as N&W seems to concede, using the terms "apparently," "may, in some contexts") in the June 21 Decision, we cannot find that N&W has made a substantial case for reopening and reconsideration of that decision on this basis.

Finally, both N&W (Pet. for Recon. 14-18) and CSX (Pet. for Recon. 4-7) assert that the Commission erred materially in its treatment of Section 11341(a), discussed in the final three pages of the June 21 Decision (6 I.C.C.2d at 754-56). If we understand the argument, petitioners disagree with our suggestion of a relationship between Section 11341(a) and Section 11347 (6 I.C.C.2d at 754): "We submit that Congress has given us the power in § 11341(a) to exempt mergers and consolidations from the RLA [Railway Labor Act] at least to the extent of our authority under § 11347." Petitioners maintain that our authority is significantly broader and overcomes all legal obstacles including collective bargaining agreements (CBAs).

We fail to see how petitioners' view of the law constitutes a substantial case for reconsidering and modifying the June 21 decision. First, we ruled in that decision that CBAs could be modified pursuant to Section 11347, and did not rely on Section 11341 (a) for that power. We found that our power under Section 11341(a) "reinforces" our authority under Section 11347, but "in accordance with the opinion of the Court of Appeals, we do not rely on § 11341 as a basis for effecting modification of CBAs." 6

I.C.C.2d at 756. Since we did not rely on Section 11341(a), we question whether petitioners' objections even involve the "merits" of the June 21 decision. More significantly, they appear to be complaining that we deferred to the mandate of the *Carmen* court when we observed that court's holding that Section 11341 does *not* authorize the modification of CBAs. This we believe we are obliged to do as a matter of law unless and until we are successful in having that view declared erroneous by the Supreme Court.

Secondly, petitioners appear to be complaining that we have impermissibly limited the reach of Section 11341(a). As we have stated, to the extent we asserted Section 11341(a) authority at all we concluded that such authority must extend "at least to the extent" of our Section 11347 authority in the June 21 Decision. We also indicated in that decision that we are asserting more expansive Section 11341(a) authority before the Supreme Court. 6 I.C.C.2d at 756 n.34. If that Court should rule that the *Carmen* court was in error, we would, of course, consider the appropriate scope of our authority under Section 11341(a).[9] Until such time, we see no basis for petitioners' assertion that our discussion of Section 11341

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[9] We do not disagree with the following statement of CSX (July 2 Pet. 8), but we cannot find it to be the type of challenge to the merits of the June 21 Decision that would justify a stay of that decision:

> If the Supreme Court rules, as both CSXT and the Commission have urged, that § 11341(a) broadly immunizes CSXT from compliance with "all legal obstacles", the Commission will need to reconsider its decision that such broad immunity was intended by Congress to be restricted nonetheless by a requirement that it be balanced with the obligations flowing from collective bargaining agreements.

(a) in the June 21 Decision is in error. We fully considered these matters prior to issuance to our decision. We concluded that this was an insufficient reason to withhold the guidance to participants in railroad consolidations provided by our decision so that such transactions may go forward in the interim. Accordingly, petitioners have failed to demonstrate that there is a strong likelihood that they will prevail on the merits or even establish a substantial case on the merits.

III. HARM TO OTHERS

The harm to other interested parties is not a substantial factor here. CSX reports that the employees covered by the Orange Book were never transferred (July 2 Pet. 4). Only two employees who moved in the N&W transaction are still employed, the remainder having retired (July 2 Pet. 8 n.8).

IV. THE PUBLIC INTEREST

The final hurdle for petitioner to overcome is to demonstrate that the public interest supports the granting of a stay. In our view the public interest requires that the petitions for stay be denied.

The significance of this factor was discussed in *Virginia Petroleum*, 259 F.2d at 925:

> Where lies the public interest? In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interest of private litigants must give way to the realization of public purposes.

Furthermore, it is a "fundamental principle . . . that where Congress has entrusted an administrative

agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" *American Power and Light Co. v. SEC*, 329 U.S. 90, 112 (1946), quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 117, 194 (1941). In deciding whether to stay a Commission decision, a court will not substitute its judgment for that of the Commission in determining where the public interest lies. *Atchison, Topeka and Santa Fe Railway Co., v. Wichita Board of Trade*, 412 U.S. 800, 825 (1973).

The Commission has conducted an extensive proceeding, involving the submission of briefs and oral argument before the full Commission, and we issued a lengthy opinion in furtherance of the public interest. We described the period of "essentially harmonious relationship between management and labor" prior to the 1980's (6 I.C.C.2d at 720. 740-745) and the subsequent period of conflict over the commands of the Interstate Commerce Act and the Railway Labor Act leading to substantial litigation (6 I.C.C. 2d at 745-52). We explained the factors that we believed

> altered the balance between labor's legitimate right to bargain collectively under RLA procedures over changes in pay, rules and working conditions and management's need to implement operating changes to achieve the benefits of consolidations. 6 I.C.C.2d at 752.

We then said (*id.*) "We hope to restore that balance here." We do not know if we will be successful in our attempt to restore some harmony to labor-management relations in the all-important area of rail consolidations through the standards enunciated in the June 21 Decision, but we strongly believe our

proposals should be tried. Acceding to petitioners' request for a stay would mean that the anticipated benefits to the railroad industry, labor, and the general public they serve would be indefinitely delayed. In our view, the public interest strongly requires that our proposals be applied now by rail management, labor and arbitrators. Moreover, as we have indicated, we believe the public interest strongly supports providing the guidance afforded by our June 21 Decision so that the sorts of transactions covered thereby may go forward pending review by the Supreme Court of the issues complained of by petitioners.

This decision will not significantly affect the quality of the human environment or energy conservation.

It is ordered:

1. The petitions for stay are denied.

2. This decision is effective on July 20, 1990.

By the Commission, Chairman Philbin, Vice Chairman Phillips, Commissioners Simmons, Lamboley, and Emmett. Commissioner Lamboley commented with a separate expression.

Sidney L. Strickland, Jr.
Secretary

COMMISSIONER LAMBOLEY, commenting:

I do not share the views expressed concerning the appropriateness of remanding this matter to the parties rather than to the arbitrator whose decision was at issue on review.[1] Where the Commission in reviewing a specific arbitral award finds error or other reason for remand it is proper to remand that award back to the arbitrator. This would avoid the procedural and substantive problems experienced in *Springfield Terminal*.[2]

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[1] In one sense, an arbitrator acting under the authority of conditions imposed by the Commission pursuant to the Interstate Commerce Act—i.e., under the authority delegated by the Commission—is our agent, akin in standing to an ALJ.

[2] See FD No. 30965, *Delaware and Hudson Railway Company—Lease and Trackage Rights Exemption—Springfield Terminal Railway Company*, decisions served October 26, 1989, December 12, 1989, December 20, 1989 and January 9, 1990.

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